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ABSTRACT

This magazine aims to help high school teachers of civics, government, history, law, and law-related education program developers educate students about legal issues. This issue focuses on voting. It contains 11 articles: (1) "The Project of Democracy" (A. Keyssar) demonstrates how the story of the right to vote represents a slow and fitful movement toward universal suffrage and why democracy continues to be a work in progress; (2) "Where Politics, Race, and Law Collide" (J. G. Hebert; J. B. Williams) explores legal challenges redistricting presented following the 2000 census; (3) "Can the Judiciary Be 'Representative?'" (B. A. Perry) explains the sense in which judges can be representative of the people and still aspire to the neutrality expected of them; (4) "Election 2000: Voting Issues and Recommendations" (D. L. Davison) presents questions raised by the 2000 election regarding the voting process; (5) "Voices" (K. Albowicz; M. L. Campbell; C. Jefferson-Jenkins) presents three voter organization members sharing their ideas on why every vote counts; (6) "Students in Action" helps students acquire information and begin to develop skills needed for engaging in public debate about voting rights, representation, and reform; (7) "Learning Gateways" introduces students to the history of U.S. voter registration, practices, and policies; (8) "Supreme Court Roundup" (C. F. Williams) discusses the Court's activity during the current term, including school voucher, affirmative-action, online pornography, and death-penalty cases; (9) "News from Capitol Hill" (A. S. Heinz) looks at how the events of September 11, 2001, altered Capitol Hill's political agenda in diverse debates; (10) "Teaching with the News" (J. Landman) traces the phenomenon of jury nullification to its origins and shows why/how it is still practiced; and (11) "Media Specialist's Corner" (M. Parrini; J. Kittlaus) identifies Web sites for students seeking primary documents related to voter representation. (BT)

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INSIGHTS

ON LAW & SOCIETY

Journal of the American Bar Association

Voice of the People

Representative Government
in the United States

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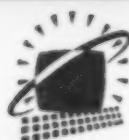
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ABA Honored for Outstanding Work

Insights Wins EdPress Award!

Described as having helped to define "the standards of excellence for educational publishing," *Insights on Law & Society* has won the Association of Education's Publisher (EdPress) 2001 Distinguished Achievement Award (see our special logo!). The honor was announced at the National Press Club in Washington, D.C., in June.



- 4 **The Project of Democracy** Alexander Keyssar demonstrates how the story of the right to vote has been one of a slow and fitful movement toward universal suffrage and why democracy itself continues to be a work in progress.



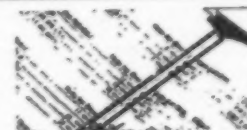
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Director's Note

I remember November 22, 1963. My classmates and I were looking forward to an exciting senior year in high school. With a single shot, our innocence was shattered, our optimism dimmed, our lives profoundly affected by the assassination of the nation's president.

Little did we realize that this extraordinary event would be a beginning. With the assassination of three more key voices of 1960s America and the Civil Rights Movement and the Vietnam War as a backdrop, our generation seemed destined to live in an America constantly rocked by transformative events.

There is little question about the profound impact of September 11. The events and their aftermath have challenged the way we think about ourselves as Americans. We are no longer invulnerable. Rather, we are vulnerable in ways that seemed impossible, unthinkable, a few months ago. Terrorism has shaken our sense of security, heightened our fears, and undermined our trust.

As I reflect on these events, nearly 40 years apart, I am compelled to reflect on what they mean to our way of life. Can freedom and liberty continue to be measured by pre-September 11 standards? To what extent is safety at odds with our ideas of liberty? To what extent is the celebrated pluralism of our democracy no longer a strength but a cause of unease?

Through its national conversations program in the mid-90s, the National Endowment for the Humanities urged Americans to re-establish the public dialogue that strengthens and sustains our democratic way of life. I believe this call for shared understanding and public discussion has gained in importance as a result of the events of September 11.

In early January, the American Bar Association will launch a special initiative to encourage a series of conversations in secondary schools and community settings in order to offer Americans of all ages the opportunity to participate in informed conversations that advance public dialogue, discussion, and debate on the issues of law and liberty in times of crisis. These conversations will be organized around four topics: Prosecuting Terrorism at Home and Abroad, Civil Liberties in a Time of Crisis, American Identities and Constitutional Values, and Democracy and Debate.

We urge you and your students to join these conversations. Visit our Web site www.abanet.org/publiced on January 7 for our downloadable resource guide.

Mabel McKinney-Browning

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Insights helps high-school teachers of civics, government, history, and law, as well as law-related-education program developers, educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education.

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The Project of Democracy

The story of the right to vote is one of a slow and fitful move toward universal suffrage, but democracy itself continues to be a work in progress.

by Alexander Keyssar

This is a story with a partially happy ending. At the opening of the twenty-first century ... nearly all adult citizens of the United States are legally entitled to vote. What once was a long list of restrictions on the franchise has been whittled down to a small set of constraints....

The proportion of the adult population enfranchised is far greater than it was at the nation's founding or at the end of the nineteenth century. That there exists a right to vote rather than the privilege of voting is clearly established in law as well as in popular convictions.

Path to Universal Suffrage

Yet getting here has taken a very long time. The elementary act of voting—of participating in the shaping of our laws and the selection of our lawmakers—was, for many decades, reserved to white, English-speaking, literate males, a majority of whom belonged to the respectable classes. As late as 1950, basic political rights were denied to most African Americans in the South, as well as significant pockets of voters elsewhere, including the illiterate in New York, Native Americans in Utah, many Hispanics in Texas and California, and the recently mobile everywhere.

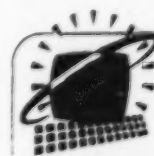
That it took so long for universal suffrage to be achieved reflects elements of our history that fit uneasily into the official portrait of the United States as the standard bearer of democracy and representative government. One such element—known to scholarly specialists but widely ignored in popular culture—is that the right to vote has never been formally enshrined in our nation's constitutional order. At the country's birth, there were few believers in universal suffrage, even for males: the Bill of Rights guaranteed Americans freedom of speech and the right to bear arms, but it did not guarantee the right to participate in elections. Not until 1868, with the passage of the Fourteenth Amendment, did the phrase "the right to vote" appear in the federal Constitution, and to this day the nation's fundamental law contains no affirmative embrace of universal suffrage....

In addition, large and influential sectors of the population have frequently opposed democratization and the extension of political rights to all Americans. They did so both to defend their own interests and because their beliefs and prejudices led them to view others as something less than responsible or worthy citizens. Most men did not want to enfranchise women until the twentieth century; most

"[L]arge and influential sectors of the population have frequently opposed ... the extension of political rights to all Americans."

Alexander Keyssar is a professor of history at Duke University in Durham, N.C.

Abridged and adapted from The Right to Vote: The Contested History of Democracy in the United States (New York: Basic Books, 2000), 316–24, by permission of the publisher.



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whites did not want to enfranchise blacks or other racial minorities in their own states; the native-born often were resistant to granting suffrage to immigrants; the wealthy at times sought to deny political citizenship to the poor; established community residents preferred to fence out new arrivals....

It took powerful forces, as well as decades of conflict and change, to overcome resistance to a broad franchise. Two of the largest social movements in American history were devoted to achieving suffrage for women and for blacks; smaller, less celebrated campaigns of agitation were mounted by militiamen in the early nineteenth century, by workers in Rhode Island, by Asians, Native Americans, and young people in the twentieth century. The eventual success of these movements was made possible by the dynamics of party competition, by economic changes that spawned new patterns of labor force participation (e.g., among women), and by surges of urbanization that lessened the isolation and heightened the visibility of some excluded groups (e.g., blacks and Native Americans).... The expansion depended too on war: the most prominent peaks in the history of the franchise in the United States were the Revolutionary War, the Civil War, World Wars I and II, and the first decades of the cold war. Each of these conflicts contributed significantly to the broadening of the right to vote.

Powerful as the forces promoting democratization may have been, their progress was not inexorable, and the outcome was far from certain. From the perspective of the late twentieth century, it is all too easy to invest the triumph of universal suffrage with an aura of inevitability; but the contested history suggests otherwise.... [H]ad Radical Republicans not successfully pressed for the Fourteenth and Fifteenth Amendments (the latter passed during

International Voter Turnout, 1991-2000

	%
Italy	90
Australia	83
Argentina	81
Turkey	80
United Kingdom	72
Germany	72
Thailand	62
France	61
Canada	60
Mexico	58
United States	45
Switzerland	38

Note: Based on voting-age population, typically in 2-3 elections (5 in U.S.).

Source: Center for Democracy and Voting (www.fairvote.org/turnout/inturnout.htm).

the final days of a session of Congress), the twentieth-century struggle for civil rights might have been far more arduous; were it not for the war in Vietnam, the voting age still might be twenty-one....

The lack of inevitability ... also is suggested by the reversals of direction that characterize the history. Not only was there a prolonged period when the franchise on the whole was tightened rather than expanded, but there were numerous occasions on which particular groups lost political rights that they once had possessed: women in New Jersey in the early nineteenth century; blacks in the mid-Atlantic states before 1860 and in the South after 1890; naturalized Irish immigrants during the Know-Nothing period; aliens in the late nineteenth and early twentieth centuries; men and women who were on public relief in Maine in the 1930s; and countless citizens who suddenly found themselves confronted with extended residency requirements or newly complex registration rules....

Nonexercise of the Right to Vote

All of which brings us back to the fact that the ending to the story is only partially happy. Although the formal right to vote is now nearly universal, few observers would characterize the United States as ... a nation where the quality of political rights offers release to a host of engaged and diverse political voices. The most telling symptom of the malady is the low level of popular participation in American elections: in recent years, only half of all eligible adults have voted in presidential elections, and fewer than 40 percent generally cast their ballots in other contests. Electoral turnout has declined significantly over the last century, and it is markedly lower in the United States than in most other nations. (Wolfinger and Rosenstone 1980; Piven and Cloward 1988; *New York Times* 1988, 1996)

In theory, of course, nonvoting could be a sign of contentment, of a satisfied electorate. But portraits of the nonvoting population make this rosy interpretation difficult to sustain: turnout is lowest among the poor, minorities, and the less well educated.... The people who are least likely to be content and complacent (and most likely to need government help) are those who are least likely to vote. (Rokkan, Campbell, Trosvik, and Valen 1970; Wolfinger and Rosenstone 1980; *New York Times* 1994, 1995, 1996)

As debates among political scientists have made clear, there are numerous factors that contribute to this low and class-skewed turnout. Yet it is not a coincidence that nonvoters come disproportionately from the same social groups that in earlier decades were the targets of restrictions on the franchise itself. Despite the Motor Voter bill, there remain procedural obstacles to registration that have a heavy impact on the poor and uneducated. Perhaps more important, the political institutions and

culture that evolved during the end of restricted suffrage spawned a political system that offers few attractive choices to the nation's least well-off citizens. The two major political parties operate within a narrow, ideological spectrum. ... Ideas and proposals that might appeal to the poor and are commonplace in other nations—such as national health insurance or laws enhancing job security—have been beyond the pale of modern American political discourse. (Burnham 1970, 1979; Piven and Cloward 1988; Teixeira 1992)



The 1965 Voting Rights Act was designed to end racially discriminatory voting practices, especially against African Americans.

The range of choices offered to the public has been kept narrow, in part through the increasing institutionalization of the two-party system: rules governing ballot access limit the ability of dissident parties to mount national campaigns; public funding goes only to parties that already are established; and the persistence of winner-take all elections makes it exceedingly difficult for new parties to gradually acquire influence, visibility, and strength.... Meanwhile, the two major parties have displayed little interest in altering the political equation (and rocking the boat) by reaching out to nonvoters....

Democracy as a Project

Yet the sweep of history suggests that democracy should not be imagined or understood as a static condition or a fixed set of rules and institutions; it may be more valuable—and accurate—to think instead of democracy as a project (Horwitz 1992) ... a goal, something to be endlessly nurtured and reinforced....

The ideal of democracy—that all individuals are not only born equal but remain equally worthy—surely is an admirable one. The principle that no person's interests and needs are more important than those of anyone else—and thus that all individuals should have an equal chance of influencing government policy—seems well worth fighting for. (Verba, Schlozman, and Brady 1995) The project of democracy has never been unanimously embraced in the United States, but it has animated and shaped a great deal of our history. For more than two centuries, men and women who were committed to that project have pressed it forward, despite ceaseless and sometimes forceful opposition. This history of the right to vote is a record of the slow and fitful progress of the project, progress that was hard won and often subject to reverses. The gains so far achieved need to be protected, while the vision of a more democratic society can continue to inspire our hopes and our actions.

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For Discussion

What forces in U.S. history helped change resistance to broader suffrage?

Why can the story of suffrage in the United States be described as having only "a partially happy ending"?

What forces today help keep voter turnout in the United States low?



Where Politics, Race, and Law Collide

Redistricting after the 2000 census presents legal challenges.

by J. Gerald Hebert and John Bryan Williams

The release of state-by-state U.S. Census data earlier this year signaled the beginning of a new round of congressional and legislative redistricting. Because the U.S. Constitution gives states the primary responsibility for redrawing electoral district lines, state governments around the country have been preparing for the last several years to tackle the technical, legal, and political challenges that inevitably arise during the redistricting process.

Each state takes a different approach to redistricting. In many states, legislatures remain the place where district lines are drawn and debated. Other states, however, have set up boards or commissions to manage the redistricting process. Iowa, for example, puts the nonpartisan Legislative Service Bureau in charge of drawing its maps, while Washington appoints a four-citizen Redistricting Commission.

States also have different redistricting policy priorities. Some states place a high priority on drawing congressional and legislative districts that follow county or municipal lines. Others emphasize the importance of protecting "communities of interest" rather than political subdivisions. While some states value preserving the cores of existing districts or protecting incumbents during the redistricting process, others explicitly reject these principles. An Oregon redistricting statute, for example, reads: "No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."

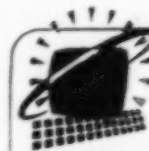
As though the redistricting process weren't complicated enough, state legislators, judges, and policy makers also need to be more aware than ever of the federal laws and constitutional requirements limiting the way they can draw districts. Since the 1960s, the U.S. Congress and the U.S. Supreme Court have introduced a number of new legal requirements states must follow during their decennial redistricting process. The most important federal redistricting principles are reviewed below.

Population Equality

Perhaps the most fundamental requirement the law imposes on redistricters is "population equality," also known as the "one person, one vote" standard. In practical terms, population equality means that each district should have roughly, if not precisely, the same number of people as every other district. While recognizing that it may be impossible "to achieve precise mathematical equality," the U.S.

J. Gerald Hebert is a sole practitioner in Alexandria, Va., and adjunct professor of law at Georgetown University Law Center in Washington, D.C. John Bryan Williams is assistant general counsel at IMPAC 2000 in Washington, D.C., the national organization responsible for formulating, coordinating, and implementing Democratic congressional redistricting efforts (visit www.impac2000.org).

"[T]he U.S. Congress and the U.S. Supreme Court have introduced a number of new legal requirements states must follow [in] redistricting."



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Supreme Court has instructed states to make "a good-faith" effort to get as close as possible to population equality.

There are two different legal standards for determining whether this principle has been satisfied. A rather strict standard governs congressional redistricting. A considerably looser standard governs all other state and local election districts.

Congressional Districts. Population equality principles for congressional districts are governed by Article I, Section 2 of the U. S. Constitution, which provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States ... Representatives ... shall be apportioned among the several States ... according to their respective numbers." The Supreme Court has interpreted the clause to mean that each congressional district within a state must have the same, or virtually the same, number of persons.

The leading U.S. Supreme Court case on population equality for congressional districts, *Karcher v. Daggett*, 462 U.S. 725 (1983), sets out two basic questions that must be answered to determine whether a state's congressional districting plan complies with Article I, Section 2:

1. If there is population deviation, could the population difference among the districts have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population? Using district mapping software that is now commercially available, any state making a good-faith effort can draw districts with virtually no deviations, and most will likely do so in the post-2000 redistricting round.
2. If the state did not make a good-faith effort to achieve equality, can it prove that each significant variance among

the districts was necessary to achieve some legitimate goal? To successfully answer this question, a state must show it consistently applied an important legislative policy, such as making districts compact, respecting mutual boundaries, respecting precinct boundaries, preserving the cores of prior districts, and avoiding contests between incumbents, to name a few.

Legislative Districts. State legislative districts (and other local government districts, as well) are also subject to "one person, one vote" requirements flowing from the equal protection clause of the Fourteenth Amendment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Supreme Court has interpreted the clause as requiring states to make "an honest and good-faith effort" to create population equality among districts. *Reynolds v. Sims*, 377 U.S. 533 (1964)

The equipopulation standard for state legislative districts is far more flexible than that for congressional districts. A total population deviation of up to 10 percent is generally considered acceptable without any justification at all, as long as the deviation is not the result of some unconstitutional, irrational, or arbitrary state policy. In addition, it may be easier to justify state and local districts with deviations beyond 10 percent than it is to justify even the most minimal deviation in a congressional districting plan.

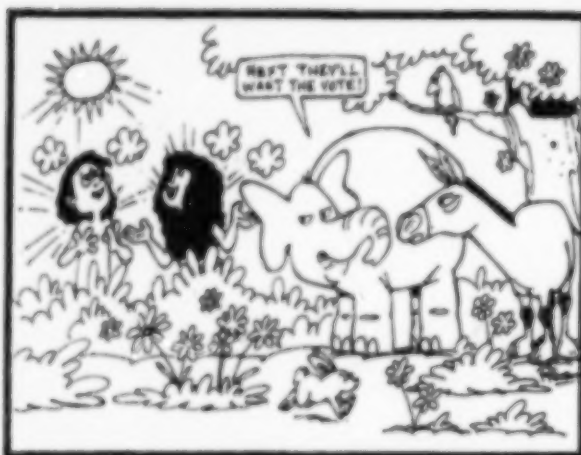


Illustration by Rick Inman

Voting Rights Act

Congress passed the Voting Rights Act (VRA) in 1965 to end the racially discriminatory voting practices many states had employed against minority voters, especially African Americans. The VRA's provisions are still very relevant for states with significant minority populations as they redraw their congressional and legislative districts.

Section 5. Section 5 of the VRA, 42 U.S.C. §1973c, applies only to nine entire states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and to parts of seven others (California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota). Section 5 requires these covered jurisdictions to obtain either administrative preclearance from the U.S. Attorney General or judicial preclearance from the U.S. District Court of the District of Columbia for any change in a "standard, practice, or procedure with respect to voting." A new congressional or legislative redistricting plan qualifies as such a change. To obtain preclearance, the state bears the burden on proof to show that its new redistricting plan "does not have the purpose and will not have the effect of denying or

abridging the right to vote on account of race or color or [membership in a language minority group]."

Section 2. Unlike Section 5, Section 2 of the VRA, 42 U.S.C. §1973, applies nationwide. Section 2 prohibits what is referred to as "minority vote dilution." It prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a racial or language minority to elect its candidates of choice on an equal basis with other voters.

In the context of redistricting, where the provision has been applied most frequently, Section 2 poses the following question: When and how must a state draw district lines to enhance the voting power of a racial minority? Or, more basically, when must a state create "majority-minority" districts—districts in which a minority group constitutes an effective voting majority?

In 1986, in *Thornburgh v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court tried to articulate a framework to address this issue. Under the so-called "Gingles test," the first step in determining whether an effective minority district is mandated by Section 2 is to ask the following three questions:

1. Is the minority group "sufficiently large and geographically compact to constitute a majority" in a differently drawn single-member district?
2. Is the minority group "politically cohesive"?
3. Does the white majority vote "sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority's preferred candidate"?

If the answer to any of these questions is no, Section 2 does not require the creation of a district in which minority voters can elect a candidate of their choice.

Yet even if the answer to all three *Gingles* questions is yes, Section 2 still may not require a state to create an effective minority district. Only if, under the "totality of the circumstances," the minority group has less opportunity than whites to participate in the political process and to elect representatives of its choice must such a district be created.

Racial Gerrymandering

In 1993, in *Shaw v. Reno*, 509 U.S. 630 (1993), the U.S. Supreme Court created a new constraint on the redistricting process, declaring that the excessive and unjustified use of race in redistricting is prohibited by the Equal Protection Clause of the Fourteenth Amendment.

The *Shaw* doctrine represents an increasingly important area of voting-rights law, one that tugs states in directions seemingly counter to the Voting Rights Act, which requires states to consider race and ethnicity to ensure that minority voters are protected. In less than seven years, courts have invoked *Shaw* to strike down districting plans in Alabama, Florida, Georgia, Louisiana, New York, North Carolina, South Carolina, Texas, and Virginia.

District shape is one of the principal categories of evidence upon which courts have relied in determining whether racial gerrymandering exists. North Carolina's 12th congressional district, for example, was approximately 160 miles long and, for much of its length, less than a mile

wide. The Court described it as winding "in a snakelike fashion" through different neighborhoods to "gobble in enough enclaves of black neighborhoods"; and in one instance it sharpened to a point before leapfrogging over another district.

Existing court opinions pertaining to *Shaw* claims provide some guidance as to the districting principles that can assist in defeating a racial gerrymandering charge. Though the list is not exhaustive, it includes compactness, contiguity, respect for political subdivisions, respect for communities of interest, protection of incumbents, and preservation of the cores of existing districts.

The state authorities charged with drawing the next decade's political boundaries face a difficult task: to draw new maps that balance a number of conflicting and sometimes openly contradictory political, racial, and legal factors. At a time when Democrats and Republicans are at near parity and the politics of race and ethnicity approaches the boiling point, states should expect that their plans will be challenged in state and federal courts. The best they can realistically hope for is that they have drawn their maps with enough planning, care, and skill to successfully survive legal challenges.

FOR DISCUSSION

What does *population equality* mean in terms of congressional districts?

What effect did the Voting Rights Act have on congressional redistricting?

In what way are federal legal requirements on redistricting somewhat contradictory?

Can the Judiciary Be "Representative"?

There is a sense in which judges can be representative and still aspire to the neutrality that we expect of them.

by Barbara A. Perry

One of the most intriguing criteria used by presidents in the history of federal judicial appointments is "representativeness." Why place the term in quotation marks? We usually consider the president and Congress, elected by the people, to be at least relatively representative of the majority of the electorate. Our idealized view of judges, however, posits that they should be above any preference toward groups or constituencies in society. Judges are supposed to be neutral arbiters of the law, following legal precedents and applying them to the facts in a case. Judges' personal/political/ideological backgrounds are not supposed to play a role in their decisions.

Yet there is a sense in which judges can be representative and still aspire to the neutrality that we expect of jurists. Political theorist Hanna Pitkin conceptualized what she called "descriptive representation," which looks at *who* the representative is or *what he or she is like* rather than *what he or she does*. As Pitkin explained, "The representative does not act for others; he 'stands for' them, by virtue of a correspondence or connection between them, a resemblance or reflection." Other theorists have called this view "passive representation," or the mirroring of societal characteristics, as contrasted with "active representation," which entails the vigorous pursuit of the interests of the represented. (Perry 1991)

Supreme Court

Examples of the most widely used representative characteristics in nominations of U.S. Supreme Court justices include geography, religion, race, and gender. Every president from George Washington to Ulysses S. Grant recognized geographic suitability among his selection criteria—whether it was for political reasons, symbolic considerations, or practical issues. In the case of social characteristics such as religion, race, and gender, presidents often hoped to assure new and/or marginal groups in society that they cared about their concerns and would increase the legitimacy of the Supreme Court by having it reflect more constituencies extant in the nation.

As immigrant groups flocked to the United States in the late nineteenth century, boosting the number of Catholics and Jews in the population, presidents became more interested in appointing members of minority religions to the Supreme Court. In fact, a "Catholic seat" and a "Jewish seat" emerged on the high tribunal by the early twentieth century. (Perry 1989) In more recent times, however, the passive and active forms of representation have conflicted. For example, Justices Brennan and Scalia, both devout Roman Catholics, voted completely oppositely on the

"[W]idely used representative characteristics in nominations of U.S. Supreme Court justices include geography, religion, race, and gender."



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abortion issue, with Brennan supporting a woman's right to choose and Scalia opposing a right to abortion services.

The black community's nearly unanimous opposition to Clarence Thomas's nomination in 1991 stemmed from the fact that his predecessor on the Supreme Court, Thurgood Marshall, was an icon of the civil rights movement, whereas Thomas was on the record as opposing modern efforts to promote minority interests, such as affirmative action. Justices O'Connor and Ginsburg, while certainly conveying symbolic triumphs for women by rising to the highest judicial positions in the land, also actively represent women's interests in their jurisprudence. (Perry and Abraham 1998) Indeed, although O'Connor is generally a moderate conservative on most issues, she nearly always represents the liberal position promoting women's causes in her gender case votes.

Lower Courts

Regarding race and gender, the issue of judicial representativeness on the lower federal courts emerged during the presidency of Jimmy Carter. Although he had no opportunity to name a member of the U.S. Supreme Court, he vowed to make the U.S. District Courts and the U.S. Courts of Appeals more reflective of traditionally unrepresented minority groups and women. During his presidential tenure, from 1977 to 1981, Carter named more black federal judges than the combined total of all his predecessors. He nominated nine blacks to the circuit courts (including Amalya Kearse, the first black female federal appellate court judge) and 28 blacks to the district courts. Carter also nominated 11 women to the circuit courts and 29 females to the district courts.

In contrast, of President Reagan's 346 nominees to the federal courts in his eight years in office, only seven were

black. (Six were appointed to the district courts and one to the court of appeals.) Reagan appointed 24 women to the district courts and four to the courts of appeals. Ironically, Reagan, who opposed affirmative-action policies, appointed O'Connor in 1981 to be the first female U.S. Supreme Court justice. He did so to close the gender gap that had appeared in his 1980 electoral tally, when men voted for him at a higher rate than women. (Perry and Abraham 1998)

The first President Bush, during his one term in office, named ten blacks to the district courts and two to the courts of appeals. For women nominees, the corresponding numbers were twenty-nine and seven.

When a Democrat returned to the White House in 1993, in the person of Bill Clinton, he made another push for women and minorities to serve on the federal judiciary. During his two terms in power, Clinton appointed 53 blacks to district courts and eight to the appellate courts. He named 87 women district judges and 20 female appellate court jurists. Clinton also succeeded, over the protracted opposition of Senator Jesse Helms (R-N.C.), in placing the first black judge, lawyer Roger Gregory from Richmond, Virginia, on the U.S. Circuit Court of Appeals for the Fourth Circuit. The Fourth Circuit contains the largest black population of any of the federal judicial circuits. Still, Clinton had to settle for a recess appointment of Judge Gregory. Clinton's successor, George W. Bush, rescinded Gregory's temporary appointment, but, bowing to political pressure and the support for Gregory from Virginia's two Republican senators, renominated him



(Illustration by Rick Slocum)

and saw him confirmed in the summer of 2001.

The presidential/congressional contretemps over attempts by the Clinton administration to nominate a black judge to the Fourth Circuit was emblematic of recent conflict between the White House and Senate over judicial confirmations. Rejections of Supreme Court nominees garner the most headlines, as they did in 1987 when the Senate nixed Reagan's nomination of Robert Bork to the high bench. Yet only five nominees were rejected for the Supreme Court in the entire twentieth century.

The trend in lower court nominations has been for the Senate to elongate the confirmation process. Since the Nixon era, when judicial nominees could expect final Senate action on their cases, on average, within a month from the time the president submitted their names, the time for Senate dispensation of judicial nominations has quadrupled. Some nominees have languished over four months while the Senate postponed action on their appointments. Both political parties have engaged in delay tactics, especially at the end of an opposing president's term, that have completely scuttled the nominations. During the last year of his term, President Clinton accused the Senate of deliberately taking longer to process the nominations of women and minorities than those of white males. Yet statistical analysis of

The Judiciary

by Stephen Bragaw

If one purpose of the U.S. system of federalism is to encourage a great diversity in approaches to issues, then by any measure it succeeds in the case of the selection of state court judges. The fifty states are marked by a rich bouillabaisse of approaches to the selection of judges for the three levels of state judiciaries: trial, appeals, and supreme courts.

Judicial Qualifications. The first notable point of difference is the answer to the basic question *Who is qualified to sit on the bench?* There are no standard qualifications for becoming a state court judge. Most states explicitly require formal legal training and membership in the state bar, but some do not (perhaps because it is simply assumed). Some require U.S. citizenship, in-state residency of a certain length of time, and/or minimum- or maximum-age qualifications. What is prevalent as an unwritten norm is participation and activism in local politics.

Process of Appointments. Forty-one states use the same process to select judges

for all three levels; nine use a different approach for trial than for appellate courts. The approaches are in five methods:

- **Partisan election** Candidates' party affiliations are listed on the ballot, and the judges and judicial hopefuls actively campaign for office. This is the preferred method for selecting all judges in Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia, as well as trial court judges in Indiana, New York, and Tennessee.
- **Nonpartisan election** Judges must be approved by the voters in an election in which their party affiliation is not listed on the ballot. This is the approach for selecting all judges in Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin, as well as for trial court judges in Arizona, Florida, Oklahoma, and South Dakota.
- **Merit selection** An independent blue ribbon panel of experts develops a short list, from which the governor chooses. After serving a short term, the judge must stand before the voters in a non-

partisan, uncontested retention election. This process is often called the Missouri Plan after its initial adoption by that state in 1940, and it is used for the selection of all judges in Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Utah, Vermont, and Wyoming and appellate courts in Arizona, Florida, Indiana, New York, Oklahoma, South Dakota, and Tennessee.

- **Gubernatorial direct appointment** The governor nominates and the state senate approves. This is the system for selecting all judges in California, Maine, New Jersey, and New Hampshire.
- **Legislative direct appointment** The state legislature has complete autonomy. This is the system used in South Carolina and Virginia for all judges and in Rhode Island for the appellate courts.

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federal judicial appointments from 1969 to 1998 does not unequivocally support Clinton's accusation. (Hartley 2001) Nevertheless, from the other side of the ideological spectrum came criticism of the Senate from none other than Chief Justice Rehnquist, whose 1997 year-end report worried that the vacancies on the federal judiciary would undermine the quality of justice. (Goldman and Slotnick 1999)

Today's Logjam

The judicial appointments logjam carried over to the new Bush administration in 2001. In the aftermath of the contentious 2000 presidential election (in effect decided by the Supreme Court in favor of George W. Bush by a 5:4 majority of

conservative justices), and with the new Senate tied evenly between Democratic and Republican seats, the nominations war escalated over the murky, and politically charged, distinction between judicial activism and restraint. The former purports to describe jurists who stray from the words and "clear" meaning of the Constitution and statutes to impose their own

sense of what the law means; the latter indicates a judge's attempt to construe law strictly, according to its literal denotation or "original intentions" of its framers.

The activism/restraint debate has momentarily superseded the dialogue over symbolically representative judges. The

continued on page 18

FOR DISCUSSION

How can a justice be representative yet still impartial?

How did the Supreme Court evolve to be representative?

What is judicial activism as opposed to judicial restraint, and how does this debate over the two affect judicial appointments?



Election 2000: Voting Issues and Recommendations

The 2000 election raised questions about the integrity of our voting processes.

by Donald L. Davison

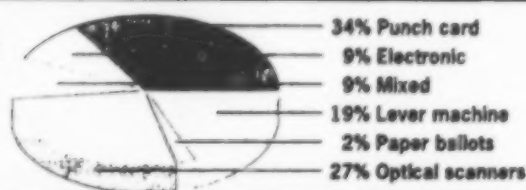
The 2000 presidential election was one of the closest contests of the last century. An independent report by researchers from the California Institute of Technology and the Massachusetts Institute of Technology estimates that between four and six million votes were lost in the election. George W. Bush was selected president by winning a majority of the Electoral College vote, but he lost the popular vote by over one-half million.

Under the Constitution, the states hold responsibility for conducting all elections—federal, state, and local. Elections primarily are managed by local subdivisions—typically counties. With over 3,100 counties in the United States, the use of a multiplicity of voting technologies is inevitable. Additionally, the arcane requirements of the Electoral College can result in the selection of a president who lost the popular vote. The 2000 election is haunted by these features.

It has also spawned many reform proposals, among them:

- Punch card systems should be replaced with optical scanning equipment. Optically scanned ballots permit voters to verify and, if necessary, correct their ballots if rejected by the scanner.
- Registration must be made more convenient. Inaccurate registration lists must be corrected, and improved methods for maintaining them adopted.

Voting Equipment Used by Registered Voters in 1998



Source: Election Data Services, www.electiondataservices.com

The U.S. Commission on Civil Rights estimates that the registration data Florida provided to county election supervisors had an error rate of 14.1 percent.

- Counties should use *provisional ballots*. Nearly three million voters were prevented from voting because of some problem with their registration. Allowing them to vote a provisional ballot that would later be verified offers a solution.
- Election information should be disclosed and disseminated. After each election, supervisors should report the total number of voters who cast ballots as well as the number of counted ballots.

Close elections affirm the lack of consensus among the voting public. When electoral laws and institutions permit candidates to win with a minority of the vote, the dissensus can intensify. Beyond the reforms mentioned above, the relevance of the Electoral College must be examined. This is essential for a democratic republic committed to equal representation, government of the people, and, "one person, one vote."

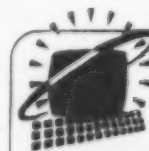
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Electoral College Info

For general information on the Electoral College, see the sidebar "How Should U.S. Elections Be Managed?" in *Students in Action* on pp. 20–21. For more detailed information, visit insightsmagazine.org; click "Students in Action."



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Why does your vote count? And how can we make more Americans realize the importance of their vote? Read what experts from three civic organizations advise.

Rocking the Vote: How We Can Reach Young Americans

by Kay Albowicz



Now that the dangling chads have settled, it's time to reveal the biggest embarrassment of November 2000: roughly half of all eligible voters did not cast a ballot. Turnout among 18- to 24-year-olds was even worse—just over 30 percent.

Experts say young adults don't vote because politicians don't talk to them, and politicians don't talk to young adults because they don't vote.

In 1998, in the national New Millennium Young Voters Survey, most students told us they prefer community volunteerism to political involvement. Volunteerism involves tangible results and a personal outcome.

Young voters also told us they want more direct and open interaction with elected officials. They are looking for genuine candidates, ones who are willing to come into their schools and campuses and act less like "suits."



In addition, one out of every four 18- to 24-year-olds told us that they don't have enough information to vote.

Above all, many young people lack good civic role models in their lives. A lot of nonvoters have very specific, often negative, images of what it means to be "political."

The good news: research shows that young people exposed to parents, schools, and communities that encourage political participation are far more likely to participate themselves. Many states are trying to adopt laws and programs that allow teen-agers to help at the polls. Some officials would like same-day voter registration, while others look to Internet voting, vote-by-mail systems, and increased civic education in schools.

Many leaders fear that last year's election problems in Florida will reinforce the belief among young people that their votes don't count. But if the cycle of disengagement continues, our biggest problem may be that young people won't even notice.

Kay Albowicz is the director of communications for the National Association of Secretaries of State in Washington, D.C., and program director of the New Millennium Young Voters Project. For more information, visit www.nass.org

A Bold New Direction in Civic Participation

by Melanie L. Campbell

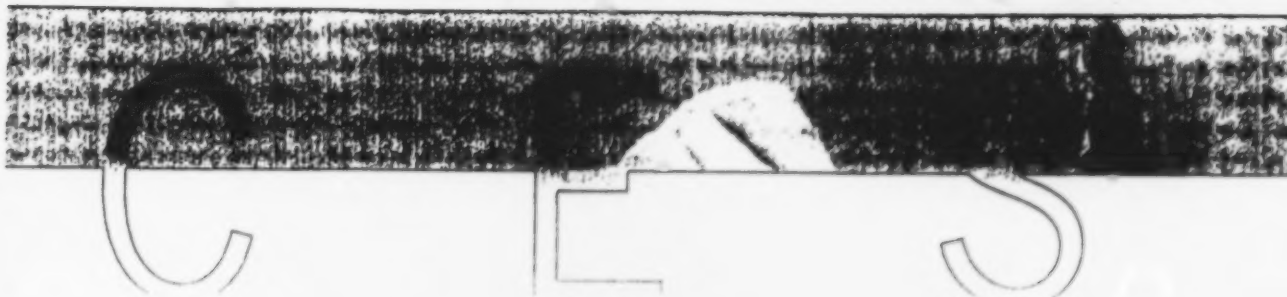


The National Coalition on Black Civic Participation, Inc., seeks to register, educate, motivate, organize, and mobilize the entire African-

American community to participate in the political process. The coalition believes civic participation is more than voting—it is the essence, the spirit of democracy. It is about having a voice to effect positive change; to have equal opportunity to succeed economically, politically, socially, and spiritually; to have the best schools for our children; to have a just society regardless of race or ethnicity; to be able to practice one's faith without prejudice. It is about having the best quality of life in our homes, our neighborhoods, our nation, and the global community.

In the 2000 election, the coalition adopted the motivation message "Lift Every Voice and Vote." This message, however, did not significantly reach a critical mass of young black voters.





African Americans under the age of 35 represent the lowest registration and voter participation levels. Therefore, the coalition's priority for the twenty-first century is to reach this constituency. The future political strength of the black community lies in the hands of our youths.

Further, youths are a key constituency in the organization's election reform efforts—Voices of the Electorate (VOTE) convened following the 2000 election debacle.

On November 7, 2000, too many people were denied their right to vote. Many votes were not counted, leading to a call for massive reform of our electoral system. Today's civil rights struggle challenges us to fight for citizens to know what their rights are at the polls and to have every vote counted. The future of our democracy depends on the confidence its citizens have in the process.

Melanie L. Campbell is executive director and CEO of the National Coalition on Black Civic Participation, Inc., in Washington, D.C. For more information, visit www.bigvote.org or e-mail ncbvp@aol.com

Voting—What's in It for Me?

by Carolyn Jefferson-Jenkins



The answer is "plenty." Election 2000, especially with the controversial outcome in Florida, drove home the importance of every single vote.

Wonder if there aren't at least a thousand people in Florida who wish now that they had voted. Votes are important in every election, however, whether for president, senator, governor, or a candidate for the local board of education.

The reason is simple: Those running for office seek to look after our interests and work to see that the public good is furthered. One need only look at the problems facing us at every level of government (from world peace and energy supplies to traffic woes, crime, and deteriorating schools) to see that it will take the best and the brightest to address these problems forthrightly and successfully. Voting is how citizens ensure that those elected

to public office are the most capable of solving the problems that confront us across the nation, in our states, and in our towns and cities.

How can you make your vote count as much as possible? Be informed and involved before, during, and after elections. Learn about the issues and where your candidates stand on them. Listen to their speeches, attend debates and rallies, ask questions of the candidates. After the election, let the successful candidate know how you feel on those issues of substance to you and monitor how that person votes on those issues.

Carolyn Jefferson-Jenkins is the fifteenth president of the League of Women Voters of the United States in Washington, D.C., and chair of the League of Women Voters Education Fund. For more information, visit www.lwv.org. For broad coverage of elections at the federal, state, and local levels, visit www.dnet.org (DNet).



Students in Action



Debating Voting Rights, Representativeness, and Reform

In this edition, Students in Action looks at whether the U.S. election system truly allows every citizen's voice to be heard. Despite the image of the United States as a model of democracy, many citizens were denied the right to vote early in our country's history. After the 2000 presidential election, many have questioned whether this is still the case.

"Whose Voice is Heard?" examines the history of the right to vote in the United States and how the path to universal suffrage has not been smooth and steady. Outlined are the various factors that prevented people from voting and the forces that helped overcome resistance to a broad franchise. You'll also learn how, despite the fact that almost all adult U.S. citizens are legally entitled to vote today, not everyone's voice is heard equally: low voter turnout and greater participation in the political process by the more affluent result in some voices being heard more than others.

"Do Our Judges 'Represent' the People?" looks at how presidents have used "representativeness" as a criterion when nominating federal judges. Can judges who represent specific groups remain neutral? How many symbolic appointments should the Supreme Court accommodate?

"How Should U.S. Elections Be Managed?" explores how the last presidential election has led to the re-examination of the country's voting processes. You'll learn about the problems with voter registration, which is the single largest contributing factor to low voter turnout. Also examined are the five types of voting technologies used, including those that are most—and least—reliable. A sidebar explains why our country's founders adopted the Electoral College and some of the controversy surrounding its existence.

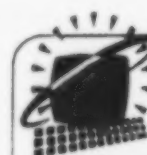
Completing the *Take Action!* activities at the end of each section will help you begin to participate in and influence the public debates surrounding these and other issues your generation will encounter concerning our electoral and judicial systems. Get started by completing the introductory *Take Action!* activity below.



Take Action!

Take a few minutes to think of how much you know about the electoral system in the United States. When is Election Day? How many Electoral College votes are needed to win the presidency? Where is the first presidential primary traditionally held? Go to www.stateofthevote.org/trivia.html and take the state-of-the-vote trivia challenge to test your knowledge.

Do problems with voter registration and voting technology effectively deny citizens the right to have their voices heard?



For the full text of this student feature, visit

insightsmagazine.org

Whose Voice Is Heard?

Voting is a key form of political expression. The results of elections are talked of as the people's "voice." Today, almost all adult U.S. citizens are legally entitled to vote. Exceptions include people who have not registered to vote, people under 18 years of age, and, in most states, prisoners and convicted felons.

Yet the right to vote has not always been so broad. Early in U.S. history, most voters were white male landowners. Nonpropertied men, women, certain racial and ethnic minorities, the poor, the illiterate, and various new arrivals to communities were all barred from voting in various ways, in various historical periods, and for varying lengths of time.

Right to vote is a term (and a concept) that actually did not exist in the Constitution until the ratification of the Fourteenth Amendment in 1868, which made former slaves citizens of the United States and of the state where they lived. The Fifteenth Amendment, ratified in 1870, guaranteed that the federal and state governments could neither deny nor abridge the right of U.S. citizens to vote on account of race, color, or previous condition of servitude. Yet the states remained free to set voter qualifications. Even as more citizens were allowed into the voting booth, politically powerful interests found ways to prevent those they viewed as less desirable, responsible, or worthy from exercising the franchise.

Grandfather clauses, poll taxes, literacy tests, and complex registration requirements all are ways U.S. citizens have been blocked or inhibited from voting. Later amendments and laws outlawed many such restrictions. The Nineteenth and Twenty-sixth Amendments gave the vote to women and to citizens aged 18–20, respectively. Still, even as late as 1950, ways were found to deny the political rights of groups such as southern blacks as well as Native Americans and Hispanics in the Southwest.

Powerful Forces Bring Change

What forces have successfully overcome such resistance to a broad franchise? Some were social movements, such as the campaigns to achieve equal rights for blacks and women. In addition, population shifts brought large numbers of African Americans and Native Americans to urban areas, making these groups more visible on the political scene.

Attitudes and values about democracy also shifted with time, and key events brought about unpredictable changes. The biggest gains in U.S. voting history came during the Revolutionary War, the Civil War, World Wars I and II, and the first decades of the Cold War. The Vietnam War brought the right to vote to 18- to 20-year-olds, the argument at the time being that if young adults were old enough to go to war, they were old enough to vote.

Yet has the progress toward broad suffrage in the United States been smooth and steady? The answer is no. In fact, over the history of the United States, suffrage has sometimes tightened, not expanded. At times groups even lost political ground, including naturalized Irish immigrants during the Know-Nothing period (1852–60), blacks in the mid-Atlantic states before 1860, southern blacks in 1890, and people on public relief in Maine in the 1930s.

Adopted in 1964, the Twenty-fourth Amendment to the U.S. Constitution banned poll taxes in national elections; in 1966, the Supreme Court banned them for state and local elections. The Voting Rights Act of 1965 created severe penalties for anyone who attempts to deprive others of their voting rights. With these and other voter protections, the goal of universal suffrage—and the climate necessary for it to exist—has come within closer reach.

Who's Talking Now?

An unhappy part of the U.S. voting story is that the electoral turnout in this country is markedly lower than in most other democratic nations. Some say that nonvoting is itself a statement—an expression of satisfaction and contentment. Yet studies have shown that those who are least likely to be satisfied—and those who are most likely to need the government's help—are also those who are

Source: "Conclusion: The Project of Democracy," in Alexander Keyssar, *The Right to Vote*, New York: Basic Books, 2000, pp. 316–24. (Also see pages 4–6 in this edition.)

least likely to vote. The nonvoter is further largely ignored by the two major political parties, which spend most of their time and resources reaching out to those who do vote.

At the same time, the more affluent citizens are, the more likely they are to participate in civic life generally and the electoral process in particular. Their voices are heard most, as are the voices of well-organized groups and well-funded lobbyists who often represent their interests.

Today, strategies to "get out the vote" of the working class and minorities are part of a continuing struggle to maneuver these groups into the camps of vying political parties. Various hindrances to voting, however, still exist. Critics of the last presidential election complained that some minority voters did not

vote because they were intimidated at or on their way to the polling place. Others argued that government should have provided assistance to poor voters who needed help in registering and voting. Great concern was raised about the counting of absentee ballots, as well as the antiquated voting equipment in poorer communities that prevented some votes from being properly cast and counted.

Many gains have been made in extending the franchise to a broad base of U.S. citizens. Yet there's still much to do, including guaranteeing fair representation; devising a system of campaign financing that allows a fair shot at winning to modestly funded candidates as well as those receiving millions of special-interest dollars; and creating a social and political climate that encourages

participation of every citizen, even the disaffected. Only then can a real "people's voice" be heard.



Take Action

1. Find out the law in your state regarding convicted felons' right to vote. Discuss whether a person who pays his/her debt to society should be allowed to vote. Does the kind of crime a person was convicted of affect your opinion?

2. Take a survey of your fellow students. Do they plan to vote when they turn eighteen? If not, why not?

3. Visit www.fairvote.org/turnout/intturnout.htm to see how the percentage of people voting in the United States compares with that of other nations. Devise a "get-out-the-vote" strategy for the next election in your community.

continued from page 12

debate will resurface most prominently if President George W. Bush has an opportunity to nominate a member of the U.S. Supreme Court. As a Texas Republican, whose party is actively courting the growing Hispanic population, he will face stiff pressure to name the first Hispanic to the high court.

Representativeness is a fact of political life and is destined not only to remain on the judicial appointment scene, but also perhaps to complicate matters, as groups (e.g., Hispanics and Asians) demand a place on the high court and lower federal judiciary, and as presidents attempt to meet their demands in return for electoral support. Only nine seats exist on the U.S. Supreme Court; it can accommodate only so many symbolic appoint-

ments. Moreover, as the first President Bush discovered in his nomination of Clarence Thomas, the tension between passive and active representation, when the latter does not match the views of the group being symbolically represented, can actually embitter the very constituency the president was trying to woo.

Alexis de Tocqueville correctly observed, nearly two centuries ago, that "the peace, prosperity, and very existence of the Union rest in the hands of ... federal judges." Thus, to carry out the metaphor, whether those hands are black, white, brown, yellow, male, or female is not nearly as important as whether they can craft interpretations of the law that will continue to preserve our Union.

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Do Our Judges "Represent" the People?

American voters elect the president, vice president, and members of Congress. We talk of these public officials as representing the people—at least, that is the ideal we hold. Judges are a different matter. Presidents nominate people for appointment to the Supreme Court and other federal judgeships. Additionally, ideal judges are thought of as being entirely neutral.

How have presidents chosen their judicial nominations? Merit has been one criterion. All presidents have also searched for jurists who are ideologically and politically compatible with them. Even personal or professional friendship has influenced some appointments.

Another standard presidents have used in selecting judicial nominees is *representativeness*. Yet if judges are impartial, how can *representativeness* be applied to them?

Judges can stand as symbols for people in the sense that they resemble them somehow. This does not mean that they would decide cases in favor

of those people. Doing so would be the *active representation* of constituents that we expect and even demand from members of Congress.

Rather, judges can *passively represent* parts of the population. For example, a large number of Asian Americans live in California, so a proportionally large number of federal judges of Asian heritage there would reflect this segment of the state's population.

The representative characteristics presidents have most widely used in nominating U.S. Supreme Court justices are geography, religion, race, and gender. Every president from George Washington to Ulysses S. Grant used geography for a variety of reasons—political, symbolic, and practical. Religion, race, and gender often indicated that presidents wanted to assure new and/or marginal groups that they cared about their concerns.

In the twentieth century, a "Catholic seat" and a "Jewish seat" emerged on the Supreme Court. Some say that a "Hispanic seat" will emerge if George

W. Bush gets to nominate a High Court Justice. There are only nine justices of the Supreme Court, and it can accommodate only so many symbolic appointments. If there's a Hispanic seat, should there be an Asian seat?

In the lower federal courts, the issue of judicial representativeness

emerged during Jimmy Carter's administration, from 1977 to 1981.

Rejections of Supreme Court nominees are hot news, yet only five nominees were rejected in the 20th century. The trend in lower court nominations has been for the Senate to make the confirmation process take longer. Both political parties have engaged in delay tactics to block nominations, especially at the end of an opposing president's term.

The debate over judicial appointments often addresses *judicial activism* versus *judicial restraint*. Judicial activists are seen as straying from the exact words and "clear" meaning of the Constitution and laws, while judges exercising restraint attempt to construe law strictly and literally according to the Founders' intentions. Judges by definition need to exercise restraint. At the same time, if in 1954 the Supreme Court had not overturned its own decision in *Plessy v. Ferguson* (1896), our public facilities—and our nation—might still be segregated.



Illustration by Rick Ingersoll

Source: Barbara A. Perry, "Can the Judiciary Be 'Representative'?" (see pages 10–12).



1. "If there's a Hispanic seat, should there be an Asian seat?" Debate the question of representativeness on the Supreme Court.

2. Do research to discover how the justices on the Supreme Court of your state are selected. Determine and list judges who run for office as opposed to being appointed. Discuss the merits of judicial selection versus election.

How Should U.S. Elections Be Managed?

The nose-to-nose finish in the 2000 presidential contest between George W. Bush and Al Gore raised serious questions about how well the voice of the people was being heard. If the people had been able to vote for the president directly, rather than through the Electoral College, Al Gore would have won. But the re-examination of the voting process didn't stop there: voter registration came under fire, as did other factors contributing to low voter turnout.

Voter Registration

The single largest contributing variable to low voter turnouts in the United States is that 25 percent of the eligible electorate is not registered and therefore may not vote. On top of that, the U.S. Census Bureau estimates that about 3 million registered voters were unable to vote in Election 2000 because of registration problems.

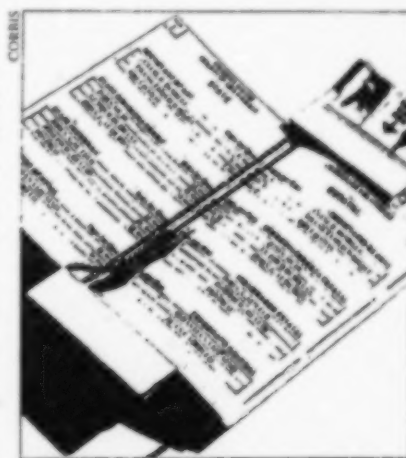
Residency requirements, early closing dates, periodic purges of individuals who have not voted recently, and inconvenient times to apply for a voter registration card all contribute to low registration levels. Furthermore, citizens who feel that they benefit little from the political system are often disinclined to spend the extra effort to register.

Only Switzerland has a lower voter turnout than the United States. The declining likelihood of citizens to vote does not uniformly affect every segment of the population. Whites participate in elections at rates higher than African Americans. Generally,

the problems associated with registration and disinclination to vote all fall more harshly on minority citizens and those with low educational levels, muffling if not muting their voices.

Five Voting Technologies

Yet when measured in air-time, certainly the greatest attention in Election 2000 was devoted to our voting technologies and what might be done to improve them. The Constitution



During Election 2000, voter confusion in Florida over how to vote using a "butterfly ballot" resulted in a public outcry to ban its use in future elections.

creates a federal republic that allocates certain responsibilities to the national government and certain powers to the states. The states hold primary responsibility for conducting all elections. Elections vary by state but primarily are managed by their local subdivisions—typically counties, whose resources and capabilities vary widely.

There are five categories of voting technologies that have been used in some degree during the past 25 years: paper ballots, mechanical lever machines, punch cards, optically scanned ballots, and "direct" recording electronic devices (DREs). Today there is a movement toward the increased computerization. Yet our earliest voting device—paper ballots—are still in use by about 1 to 2 percent of voters, especially in small towns and rural areas.

The *mechanical lever machine* accounts for about 20 percent of total votes cast. In this quick process, voters go into a curtained booth and turn individual levers to select their choices. Then they turn a master lever that records these choices on a counter.

Nearly one-third of voting is done by *punch card* systems (Votomatic and Datavote). Each voter is given a card that fits into a binderlike device with lists of choices on each cardboard page. Voters vote by lining up and punching out the perforated rectangles (chads) on their cards that correspond to their choices. Punch card systems have unique counting problems because more than one chad can be punched, some chads fall off that aren't supposed to, and some stay on completely or partially that should have fallen off. A computer scores the cards by reading which holes are punched out, so that any chad irregularities throw off the counts.

Source: Donald L. Davison, "Election 2000: Voting Issues and Recommendations," p. 13.

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 **Marksense** systems, or optically scanned devices, resemble standardized testing systems. About 25 percent of voters use scanner systems today. A large ballot card lists the choices, and voters use a pencil to blacken the oval or rectangle next to each choice. If voters change their minds, they can erase individual marks and choose again. A scanner reads the darkest marks and tabulates the results.

The most recent innovation is an electronic version of lever machines. *DREs* display possible choices on what is typically an interactive touch screen that can store choices in memory or on disk. Voters touch or click on the screen to make their choices, and results are tabulated when the polls close. Less than 10 percent of voters use some form of DRE.

Which is the most reliable voting technology? Studies have found that hand-counted paper ballots and optically scanned ballots have had the lowest rates of loss since 1988. Punch card systems consistently produce the highest rates of spoilage in presidential elections. In fact, nearly 18 percent of counties, comprising about 31 percent of the population, use the Votomatic punch card systems, which has been found to be the least reliable voting system. Researchers concluded that simply changing voting equipment, without any new technological innovations, will substantially lower the rates of votes lost because of equipment.

The Electoral College

The Founders were deeply concerned about whether common people had the wisdom to select their representatives directly. They feared that the people would fall prey to unscrupulous individuals who knew how to sway votes to their own advantage. So the Founders decided that both the president and senators should be elected indirectly, by representatives of the people rather than by the people themselves. Only members of the House of Representatives would be directly elected by voters.

Under the Constitution, each state legislature elected two senators to Congress. This procedure remained in effect until 1913, when the Seventeenth Amendment was ratified; it allowed for direct election of senators. The Constitution also established an Electoral College to elect the president. A candidate would have to win a majority of Electoral College votes in order to become president. State legislatures elected the electors. The Electoral College still exists. Each

state plus the District of Columbia is allocated a number of electors equal to the size of its total congressional delegation (the number of representatives it sends to the House plus two for its senators).

Criticism of the Electoral College began early on, after political parties began to emerge. State legislatures began to be organized by the parties, and the selection of electors became strongly influenced by the political party system. If a party dominated a state legislature, that party dominated the state's electors.

By the twentieth century, pressures mounted for reform, leading to a more democratic process. By the second half of the century, most states followed a "winner take all" approach—a state gave all its electors to whoever won the popular vote in the state, no matter how many candidates were on the ticket or how the votes split. The result is that a presidential candidate can win the popular vote overall but lose the electoral vote. That is what happened in the presidential election of 2000.



Take Action!

1. Research the pros and cons of the Electoral College. Start with the encyclopedia and online resources at dir.yahoo.com/Government/U_S_Government/Politics/Elections/Presidential_Elections/Electoral_College. Debate the Electoral College issue

and vote as a class whether to keep the institution, modify it, or go to direct popular vote of the president. Write a letter to the editor and to your representative and senator stating your view.

2. Find out what voting technology your local precinct uses and whether it is considering changing.

Learning Gateways Activities

See Strategies Here

This teaching strategy introduces students to the history of U.S. voter representation, practices, and policies, and it gives them a profile of the citizens who are going to the polls today. Follow up with related strategies at insightsmagazine.org. And don't miss the student materials on related topics starting on page 16.



Overview of the Lesson

Objectives

As a result of this lesson, students will

- Understand that suffrage in the United States is not, and never has been, universal
- Learn which U.S. citizens have been granted and which have been denied the franchise
- Recognize that voter turnout in the United States is among the lowest of all democratic nations
- Develop a sense of the importance of finding a means to strengthen the voices of citizens who—for some reason—cannot be, or do not try to be, heard

Target Group: Students grades 9+

Time Needed: 2–3 hours

Materials Needed: Classroom sets of “Whose Voice Is Heard?” (pp. 17–18), “How Should U.S. Elections Be Managed?” (pp. 20–21) and student handout (p. 23)

Procedures

1. Prepare for the lesson by reading Alexander Keyssar's article “The Project of Democracy” on pages 4–6.
2. Begin by asking students what procedures characterize their school

elections. Elicit and list the school's rules for voting. Ask students whether they feel all students have an equal voice in their school elections. Why or why not? What might suppress a student's desire to vote?

3. Distribute the student handout and have students answer the questions. Tell them they will get a second chance to answer the questions at the end of the lesson.
4. Have a student log on to www.law.cornell.edu/constitution/constitution.table.html to access a copy of the U.S. Constitution and do a word search for the term *right to vote*. Note that it cannot be found. Then have the student do the word search on the Amendments. Note that it is not until the Fourteenth Amendment, ratified in 1868, that this concept appears. (If you do not have classroom access to a computer, ask students where they believe “the right to vote” is first mentioned in the Constitution.)
5. Explain to students that a number of factors have limited the voting rights of certain groups historically. Distribute the student article “Whose Voice Is Heard?” Have students read and discuss the article in small groups.

6. Ask whether students know of any requirements that kept blacks and others from voting. (*Answers might include poll taxes and literacy tests.*) List responses and discuss. Then ask what current restrictions on voting students know about. (*U.S. citizenship and registration*) Discuss whether students agree with such restrictions.
7. Explain, that just as with school elections, there are factors other than laws that suppress voter participation in this country. Suggested ways of increasing voter turnout also consider changes in the process of voting. Distribute the student article on pages 20–21. Have students read and discuss it in small groups. Poll to determine what reforms they would like to see effected.
8. Have students look again at their student handouts and see whether there are any answers they would like to change. Then discuss the correct answers.

Answers to Student Handout on page 23

1. False. The phrase wasn't added until 1868, with the adoption of the Fourteenth Amendment.
2. All the groups were at one time denied the franchise.
3. c
4. a. True. Blacks in the mid-Atlantic states lost political rights before 1860; blacks in the South lost them after 1890.
b. False. Critical events such as war, which interacted with underlying processes, plus actual reversals of progress in bringing about reform suggest otherwise.
c. For example, adults may be unable to vote because they haven't met residency and registration requirements or because they are convicted felons.
d. True
e. False. By far, the more affluent persons (and organizations) are, the greater their participation—and influence—on government.
f. True

What Do You Know About the Right to Vote?

1. Circle True or False. With the passage of the Bill of Rights in 1791, the phrase "the right to vote" first appeared in the Constitution.

True False

2. Circle each group that at one time was denied the right to vote in the United States:

- a. African Americans
- b. blue-collar workers
- c. Hispanics
- d. the illiterate
- e. Irish Americans
- f. Native Americans
- g. community newcomers
- h. the poor
- i. women
- j. young adults

3. Circle the letter of the correct answer: The following voting qualifications have been abolished in the United States:

- a. economic, racial, age, and residency requirements
- b. gender-based, literacy, economic, and registration requirements
- c. economic, racial, gender-based, and literacy requirements
- d. none of the above

4. Circle True or False for each statement below.

a. Basic political rights were granted, and later denied, to African Americans in the North as well as the South.

True False

b. The progress toward universal suffrage in the United States can be viewed as predictable and inevitable.

True False

c. Today, all adult citizens of the United States are legally entitled to vote.

True False

d. The people in the United States who are least likely to be content, and the most likely to need government help, are least likely to vote.

e. Since the passage of the Voting Rights Act of 1965, there has been a surge in political participation among Americans in the lower income brackets.

True False

f. Without a voting system that everyone knows how to use and without the electorate's willingness to vote, the voice of the entire U.S. electorate will never be heard no matter how fair election laws might be.

True False

Teaching Standards for This Issue

Teachers of civics, government, history, and law all over the country are working toward attaining the educational standards set forth by their local communities. To assist in this effort, each edition of *Insights on Law & Society* is designed to support national standards of major educational organizations

such as the National Council for the Social Studies, the Center for Civic Education, the National Center for History in the Schools, and the American Library Association. To see the national standards supported by *Insight's Voice of the People* Edition, visit insightsmagazine.org (click "Learning Gateways").

Supreme Court Roundup

by Charles F. Williams

The New 2001-2002 Term

The Supreme Court continues to place new cases on its docket throughout the coming term, which opened October 1. As September drew to a close, the Court had already agreed to hear 42 cases and set oral argument dates for 22. Among these were an opportunity to rule on the constitutionality of school vouchers and a key affirmative-action case.

School Vouchers

No issue—not even school prayer—has served as a greater lightning rod in the church-state debate than the constitutionality of school vouchers. Each year, as conflicting opinions mounted in the lower courts, commentators debated which voucher case the Supreme Court would accept for review. Until this year, they were always wrong.

In 1998, the Wisconsin Supreme Court upheld the constitutionality of the "Milwaukee Parental Choice Program," which permits a percentage of Milwaukee students to attend any approved private school of their choice. Voucher opponents appealed, but the Supreme Court denied certiorari in *Jackson v. Benson*, 578 NW.2d 602. In 1999, the Maine Supreme Court reached the opposite result in *Bagley v. Raymond School*, 728 A.2d 127, holding that the legislature would have violated the establishment clause if it had failed to exclude all religious schools from the state's voucher program. Now it was voucher supporters' turn to appeal, but again, the Court denied certiorari.

Finally, in 2000, the Sixth Circuit Court of Appeals decided a voucher case that

experts unanimously predicted the Court could not possibly turn down. This time they were right. On September 25, the Court agreed to review *Zelman v. Simmons-Harris*, No. 00-1751.

The case concerns a six-year-old Ohio voucher program that in the 1999-2000 school year served 3,761 Cleveland students. The program was launched in 1995 by Ohio in response to a federal district court's order that the state take over Cleveland's failing and mismanaged public schools. The controversial "Ohio Pilot Project Scholarship Program" invites low-income Cleveland students to enter a lottery to win scholarships of up to \$2,500. Under the law, the parents of winners have the option of

1. Permitting their children to remain in the Cleveland public schools
2. Using the tuition voucher at a Cleveland area nonreligious private school
3. Using the voucher at a Cleveland area religious private school
4. Using the voucher to obtain special tutorial help in the Cleveland schools
5. Using the voucher at a public school in a district adjacent to Cleveland

The Sixth Circuit struck the program down, saying it favors religion in violation of the First Amendment's ban on government establishment of religion. The problem, said the majority, is that while in theory the voucher recipients have numerous nonreligious options, in practice, 96 percent of them enroll in sectarian schools. The court pointed out that participation in the voucher program is voluntary. Thus, while numerous Catholic and other religious schools have welcomed voucher students, only a handful of secular private schools have. Most troubling to the Court, not one suburban public school has ever agreed to accept one voucher student. Moreover, said the court, the participating religious schools to which the voucher students are drawn are not just "sectarian," but pervasively sectarian: "most believe in interweaving religious beliefs with secular subjects."

Now the Supreme Court has invited the state and other supporters of the program to present their argument that the Sixth Circuit's reasoning is obsolete in light of the Court's more recent church-state decisions. Specifically, the petitioners are likely to argue, the Court should adopt Justice Thomas's language in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), to the effect that government programs permitting financial aid to reach religious schools do not offend the Constitution so long as the money reaches the schools only as a result of independent and private choices.

Affirmative Action

In *Adarand Constructors, Inc. v. Mineta*, No. 00-730, the Court signaled its readiness to revisit the constitutionality of government programs that seek to assist small businesses "owned and controlled by socially and economically disadvantaged individuals."

The oral arguments on Oct. 31, 2001, marked the Supreme Court's third swing

Charles F. Williams is the editor of *Preview of U.S. Supreme Court Cases*, a publication of the ABA Division for Public Education in Chicago.

at this case, which began in 1990 as a dispute between two small firms over a contract for installing highway guardrails. Because federal law requires that a subcontracting clause similar to the one being challenged in this case appear in most federal agency contracts, the case was widely expected to affect affirmative action programs of all sorts across the nation. The subcontracting clauses in federal contracts typically encourage prime contractors to hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals." They also state that the contractor "shall presume" that socially and economically disadvantaged individuals include "black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans," and other minorities.

In its brief, Adarand asked the Court to broadly hold that there "never" can be a compelling interest in preferential treatment of racial groups in government contracting, an argument widely viewed as relevant to the ongoing affirmative-action debate in other areas, including college admissions.

Decision. On Nov. 27, 2001, the Supreme Court concluded that the race-conscious measures it had agreed to review were not being enforced in the jurisdictions in which Adarand operates, and that the company was now asking it to review other race-based programs that had not yet been considered by the lower courts. The Court therefore dismissed its writ of certiorari as being "improvidently granted," leaving what it agreed were "questions of fundamental national importance" unanswered and awaiting resolution in some future case.

Online Pornography

The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by

means of the Internet that is "harmful to minors" unless good-faith efforts are made to prevent children from obtaining access to such material. The question presented in *Ashcroft v. ACLU*, No. 00-1293, is whether the First Amendment permits the government to rely on community standards to identify the material that is "harmful to minors."

The government's previous attempt to protect minors from online pornography—The Communications Decency Act—was struck down in *ACLU v. Reno*, 521 U.S. 844 (1997), on the grounds that the statute would permit potentially harmful Internet content to be judged by the standards of the community most likely to be offended by it. COPA seeks to address the Court's concerns by clarifying that Congress now seeks to regulate only Web communications designed for commercial purposes and in a manner similar to laws restricting print pornography. Under COPA, adults would still be able to access pornographic Web sites, but they would first need to verify their age through use of a "credit card, debit account, adult access code, or adult personal identification number" or any other "reasonable measure."

Meanwhile, in *Ashcroft v. Free Speech Coalition*, No. 00-795, the Supreme Court will review a ruling by the Ninth Circuit that struck down a congressional measure criminalizing the transmission, reception, or possession of an image that "appears to be of a minor engaging in sexually explicit conduct" or that describes such an image in a manner that "conveys the impression"

that it shows a child. The law being challenged, the Child Pornography Prevention Act of 1996, seeks to counter those pornographers who strive to avoid criminal sanctions by using computer-generated images or young-looking adults to simulate child pornography.

Death Penalty

Capital punishment appears to be one area in which judicial minds may well have changed. In a 1989 case, *Perry v. Lynaugh*, 492 U.S. 302, the Court narrowly held that the Eighth Amendment does not bar the execution of all mentally retarded offenders. There was, in Justice O'Connor's words, "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited in the Eighth Amendment." Since then, however, O'Connor has publicly expressed reservations about capital punishment, and the number of death penalty states barring the execution of mentally retarded defendants has grown from 2 to 13. Twelve other states bar capital punishment altogether.

A case on this year's docket, *McCarver v. North Carolina*, No. 00-8727, asked the Court to revisit the question of mentally retarded capital defendants. When the Court determined that the case had become moot because of a recently enacted North Carolina statute prohibiting such executions, it promptly granted certiorari on another case asking the same question: *Atkins v. Virginia*, No. 00-8452.

Research Tool



For updates, more information, and additional resources about these and other Supreme Court cases, check out the *Insights* Web site (insightsmagazine.org) (click "Supreme Court Roundup").

News from Capitol Hill



by Ann Simeo Heinz

Review of Issues Facing Congress

Attacks Alter Congressional Priorities

The terrorist attacks on New York and Washington have fundamentally altered the political tone and agenda on Capitol Hill. Congressional priorities have shifted from the debate over issues such as the Social Security surplus, patients' rights, and education to providing the funds needed to respond militarily, improve intelligence operations, and help New York City and Washington recover from the aftermath of the terrorist attacks.

Tax Cuts

Before Sept. 11, Congress responded to President Bush's call for dramatic tax cuts by passing the Economic Growth and Tax Relief Reconciliation Act of 2001. The Act is expected to cut taxes by more than \$1.35 trillion over ten years. It includes tax rate reductions along with the eventual repeal of the federal estate tax.

Judicial Appointments

The Senate and President Bush have been engaged in the ongoing process of appointing judges to the federal judiciary. Earlier this year, Bush ended the American Bar Association's role in working with the administration to rate potential nominees. However, after the Democrats gained control of the Senate, the Senate Judiciary Committee revived the ABA's role, noting that it would look closely at the ABA's ratings. The Republicans are pushing for hearings on nominees to be completed before the Senate adjourns for the year. Currently, there are 108 vacancies in the federal court system, with 42 nominations pending. The Senate has confirmed very few of President Bush's nominees.

Although the majority of vacancies remain unfilled, the confirmation process is slowly moving forward.

More Action Coming on Domestic Issues

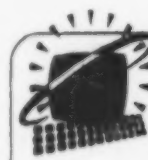
Congress still expects to address several other high-profile domestic issues before year-end. Lawmakers hope to begin negotiations on President Bush's education bill and to possibly take action on energy legislation. A patient's bill of rights is awaiting House-Senate compromise, as is a proposal to reform bankruptcy laws. President Bush is also likely to continue pushing cuts in capital gains taxes and business tax relief. Proposals for campaign finance and election law reform are still being touted but are no longer at the forefront of the congressional agenda.

Patients' Bill of Rights For several years, Congress has been divided over how best to protect patients in managed care plans and the extent of their rights to sue such plans. This year, the House and Senate each passed versions of a patients' rights bill. Despite some overlap, the versions differ significantly on one of the most

controversial questions in the patients' rights debate: how much legal recourse people should have if their health plans deny them care. A conference committee will meet to resolve differences between the two bills.

Stem Cell Research Since embryonic stem cells were first isolated by researchers in 1998, they have been the subject of a contentious political and ethical debate. Although research has been proceeding in the private sector, the federal government faced the issue of whether and to what extent it should fund stem cell research. President Bush authorized the first federal funding of research involving human embryonic stem cells, but only on the stem-cell lines that existed at the time of his announcement. Several lawmakers have proposed bills to relax these restrictions.

Election Law and Campaign Finance Reform The National Commission on Federal Election Reform issued a set of recommendations for improving the country's election system. However, few states have enacted legislation to institute uniform election systems with modern equipment, mainly because they are waiting for Congress to pass legislation that would contribute funds to the cause. Similarly, campaign finance reform legislation is at a standstill; although the Senate approved its version of a campaign finance reform law (S.27), the House has not yet approved its version of the bill (H.R. 380).



For additional
activities and the
full text of this
article, go to

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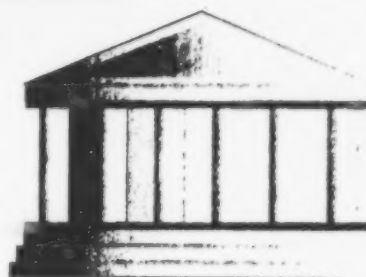
Ann Simeo Heinz is an attorney, editor, and writer working in Chicago.

Senate and Federal Judicial Appointments

Article II, Section 2, of the U.S. Constitution states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for..." The president is therefore responsible for nominating all federal judges, as well as U.S. attorneys and U.S. marshals.

Although the president nominates individuals for federal judgeships, the Senate has considerable influence in the selection of federal judges, who must win Senate confirmation. Federal judges are appointed for life and can be removed from the bench only through impeachment. Both houses share impeachment power.

As part of the confirmation process, judicial nominees must appear before the Senate Judiciary Committee, where they are questioned on their judicial philosophies and views. Most rejections of federal judicial nominees therefore take



place at the committee level, through either inaction or by a vote not to send the nomination to the Senate floor. Occasionally, the president has circumvented the confirmation process by making so-called "recess appointments" when the Senate is not in session.

Throughout the nation's history, appointments to judicial posts below the Supreme Court have not generated much controversy. This is due in part to the large number of such appointments as well as the view that lower court judges are potentially less dangerous than Supreme Court justices because they do not have the final judicial say on issues. However, in recent years, the process of filling

The federal judiciary is divided into three main levels.

The Supreme Court. The highest court in the federal system and the only federal court explicitly mandated by the Constitution.

U.S. Courts of Appeals. Directly above the district courts, this system is comprised of 11 judicial circuits each superior to one or more district courts. Each circuit has 6 to 27 judges.

Federal District Courts. Made up of 92 districts, each with between 1 and 20 judges.

seats has grown increasingly contentious, as fights over legal ideology and Senate process have become more common.

Proposed Congressional Bills

 Students and teachers can review an annotated inventory of select congressional bills proposed during the 107th Congress by visiting insightsmagazine.org.

Grouped by subject such as Election Law and Health Law, these bills have been chosen because of their probable interest and usefulness to classroom instruction. To research any congressional bill by bill name or number, visit thomas.loc.gov

Activity Ideas!

1. Have students compare the different versions of the Patients' Bill of Rights passed by the Senate and House. Have them identify and list the main differences between the two bills. Discuss: Which version do they support? What modifications would they make to the bill they prefer?
2. Have students research bills that have been proposed to expand/limit embryonic stem cell research. Have them as a class debate merits and drawbacks of these proposals based on this research and their own ideas.
3. Have students review the National Commission on Federal Election Reform's final report at www.reformelection.org as well as the proposed election law and campaign finance reform bills. Have them create their own bill, selecting from the different features of the proposals. Have students vote on what they would do to bring about election law and campaign finance reform as a student congress.
4. Have students report on pending federal judicial nominations that are

listed at www.usdoj.gov/olp/judicial-nominations.htm. What federal judges have been confirmed so far? What is the current status of the other judicial nominees? How many federal judges have been appointed, on the average, under the past several administrations? Overall, is the process largely political or not? What is a *blue slip*? How do blue slips affect the judicial nomination process? Have students report on the status of blue slips in their home states.

Teaching with the News



by James Landman

Nullification: The Jury's Controversial Power

The conscience of the community, the voice of common sense, a guard against the exercise of arbitrary power—all these terms have been used to describe the jury in a criminal trial. Jurors swear under oath to determine the facts as presented by evidence offered at the trial and apply those facts to the law given them by the court. But they also possess what courts have described as “the raw physical power to disregard both the rules of law and the evidence in order to acquit a defendant.” This power is referred to as “jury nullification.” Learn about this topical issue, and keep your students on the alert for trials in the news where commentators are speculating that jury nullification might take place. Then consider ways to weave this “news” it into your curriculum.

Origins

Jury nullification has a long history of use, and it has long been a subject of legal controversy. In recent years, it has reemerged as a topic of debate in courtrooms, in the media, and among legal scholars. The concept stretches back to the earliest days of the English common law. Both English and American juries exercised this power to subvert controversial laws in cases of seventeenth-century religious dissent, nineteenth-century slavery, and twentieth-century political protest. Yet jury nullification has also been blamed for the “sabotage of justice”—consider, for example, the two hung juries that in 1964 prevented the conviction of Byron De La Beckwith for the murder of Mississippi civil rights activist Medgar Evers.

In the 1990s, jury nullification returned to public attention when it was used to explain a string of acquittals in cases against high-profile defendants such as

Jack Kevorkian, Oliver North, Marion Barry, and Lorena Bobbitt. In a 1995 article, legal scholar and former prosecutor Paul Butler stirred controversy in the academic world with his proposal that juries use the power of nullification to acquit African-American defendants charged with “victimless crimes” in response to the criminal justice system’s perceived racism and disproportionate incarceration of African-American men.

Tougher sentencing guidelines have also produced what appear to be patterns of nullification in certain communities. In California, for example, a 1994 voter-approved “three strikes” law imposing mandatory sentences on three-time felony convicts quickly produced striking contrasts in San Francisco and San Diego. As reported in the *Los Angeles Times*, San Francisco prosecutors soon ran up against an apparent unwillingness of juries to convict if they thought it might be the defendant’s third offense,

while San Diego juries were convicting “three strike” defendants in 94 percent of the cases tried.

The jury’s nullification power derives from two basic principles of criminal procedures designed to protect defendants. The first is that criminal juries are obligated only to return “general verdicts,” which do not specify how the jury applied the law to the facts or even which law and facts the jury applied. The reason for this rule is to afford the jury the broadest possible latitude in reaching its verdict. The second principle is the constitutional bar against double jeopardy, which prevents an appellate court from overturning a trial jury’s acquittal and ordering a new trial on the same charge. Because a court can order an acquittal if it finds the evidence was insufficient to sustain a conviction, jury nullification applies in criminal trials only when the jury decides to acquit.

Juror Nullification?

In May 2001, California’s highest court made one of the strongest rulings to date on jury nullification. In a unanimous opinion in the case of *People v. Williams*, the Supreme Court of California held that a judge can properly remove a juror before a verdict is returned if the judge learns that the juror has refused to follow the law as defined in the instructions to the jury. In this case, the jury’s foreperson alerted the trial court to a juror who expressed his refusal to uphold a law he viewed as wrong, and the juror admitted to the judge that he would not be willing to follow his oath with respect to this law. After a thorough review of the case history addressing jury nullification, the Court concluded that “no published authority has restricted a trial court’s authority to discharge a juror when the record demonstrates that the juror is unable or unwilling to follow the

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court's instructions." Still pending before the California court is the validity of the state's recently adopted jury instruction that informs jurors of an obligation to immediately advise the trial judge if any juror "refuses to deliberate or expresses an intention to disregard the law."

In the meantime, debate continues over the prevalence of jury nullification, the ability of defense attorneys to raise it as an option in their arguments, and even the question of how the concept should be defined. For some commentators, centuries of usage have lifted jury nullification to the level of a right, exercisable at the jury's discretion to protest what it perceives as an unjust application of the law. For others, it is an illegitimate veto of what our elected officials have defined as culpable conduct, an arbitrary act that ultimately undermines public confidence in our judicial system and the rule of law.

Books, Articles, and Video

Abramson, Jeffrey. *We, The Jury: The Jury System and the Ideal of Democracy*. New York: Basic Books, 1994. A defense of the American jury, including arguments in favor of the tradition of jury nullification.

Adler, Stephen J. *The Jury: Trial and Error in the American Courtroom*. New York: Times Books/Random House, 1994. A critical examination of the current state of trial by jury and suggestions for reforming the system.

Burnett, D. Graham Burnett. "Anatomy of a Verdict: The View from a Juror's Chair." *The New York Times Magazine*, Sunday, August 26, 2001, Page 32. An interesting personal perspective on one jury's deliberations, including a discussion of the tension between following one's conscience and following the law.

Dolan, Maura. "Justices Say Jurors May Not Vote Conscience." *Los Angeles Times*, Tuesday, May 8, 2001, Part 2; Page 1. An article reporting on *People v. Williams*, the recent California Supreme Court case on jury nullification discussed in the preceding article.

Dolan, Maura, and Tony Perry. "Two Counties at Opposite Poles of '3 Strikes' Debate." *Los Angeles Times*, Monday, June 24, 1996, Part A, Page 1. A discussion of the role of jury nullification in the San Francisco area, where sentiment against California's "three strikes" law and mandatory sentencing ran high.

Twelve Angry Men. 1957. Starring Henry Fonda and directed by Sidney Lumet, this classic film centering on jury deliberation is perhaps the most famous dramatic jury portrayal of all time.

Relevant Recent Cases

Old Chief v. United States, 519 U.S. 172 (U.S. Supreme Court, 1997). In a footnote to Justice Souter's majority opinion, the Supreme Court acknowledged that the prospect of jury nullification was a factor that government prosecutors should properly consider when deciding which evidence to present against a defendant.

People v. Williams, 25 Cal 4th 441 (Cal. Supreme Court, 2001). This case, featured in the article, offers an excellent overview of the history and debate surrounding the phenomenon of jury nullification.

Consider These Resources

Aaseng, Nathan. *You Are the Juror*. (Minneapolis: Oliver Press, 1997). Using the descriptions provided in Aaseng's book, students can assume

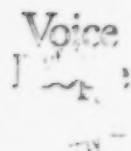
the role of a juror in eight famous trials of the twentieth century, including the Lindbergh kidnapping trial, the trial of the Chicago Seven, and Patty Hearst's trial for armed robbery.

Council for Court Excellence. *Guilty or Not Guilty: You Decide: A Participatory Jury Experience for Students*. Washington, D.C.: Council for Court Excellence, 1999. Through a short dramatization of an actual murder trial, this interactive educational video places secondary school/college students on a jury receiving instructions from an actual judge on issues that they must consider when deciding the case. A companion Teacher's Guide contains background information on the jury system, discussion questions, suggested exercises and readings, and follow-up issues relating to the students' jury experience. Order online at www.courtexcellence.org or by calling (202) 785-5917.

Additional Information

For the online text of this article, plus FAQs, useful links, and more teaching ideas, including online lesson plans, visit insightsmagazine.org





Media Specialist's Corner



Compiled by Michelle Parrini and Jennifer Kittlaus

Here's a Useful Tool ...

We hope you will find this column useful whether you are a student doing research on this issue's theme, a teacher preparing a lesson, or a library media specialist assisting students or teachers in tracking down additional resources for their course work. As a library media specialist, you might also find the column helpful as a selection tool for collection development purposes. In each print edition we include, among other resources, annotated Web sites containing primary documents students may need to locate and annotated booklists that relate to the issue's topic. Our Web site features full bibliographic information and selected reviews for booklist entries as well as links to Web sites offering additional research and instruction support. Your feedback is always appreciated.

Primary Documents for Students

Congressional Record and House Journal Accounts of Presidential Elections
freedom.house.gov/electoral/record.asp

Students may wish to read the *Congressional Record*, *House Journal*, and the House of Representatives (*Hinds' Precedents*) accounts of some historic debates about electoral voting. In 1801, Jefferson tied Burr in electoral votes; Jefferson became president. In 1821, objection was made to counting the votes from Missouri, which had not been formally admitted as a state. In the 1825 election of John Quincy Adams, none of the four major candidates for president in 1824 received a majority of electoral votes. The Civil War called the electoral votes of Louisiana and Tennessee (1865) into question. In 1869 and 1873, the electoral votes of Georgia were called into question.

The Constitution of the United States of America
www.law.cornell.edu/constitution/constitution.table.html

This Cornell University Law Center site provides links to the Constitution and all Amendments.

The Federalist Papers

www.yale.edu/lawweb/avalon/federal/fed.htm

The *Federalist Papers* are a series of 85 newspaper essays written by Alexander Hamilton, John Jay, and James Madison between October 1787 and May 1788 to urge New Yorkers to ratify the proposed U.S. Constitution. The papers explain particular provisions of the Constitution in detail. *Federalist No. 68* explains the mode of electing the president and the rationale behind the Electoral College; *Federalist No. 39* explains the Founders' conception of republican government and the state role in elections; and *Federalist No. 59* explains the role of Congress in elections.

Modern History Sourcebook:

The Passage of the Nineteenth Amendment
www.fordham.edu/halsall/mod/1920womensvote.html

Articles from *The New York Times*, 1919-1920, detailing the passage of the Nineteenth Amendment to the U.S. Constitution and the battle for state ratification.

Voting Rights Act of 1965

hcl.chass.ncsu.edu/garson/dye/docs/votrit65.htm

The text of this historic act to enforce the Fifteenth Amendment and protect the rights of all citizens to vote.

Web sites

ABA Division for Public Education: Online Conversation: Law, Diversity, and the Vote
www.abanet.org/publiced/lawday/convo/00/vote.html

Explores voting, youth citizenship, voter registration, representation in the U.S. system, and campaign reform. Articles and Web-based activities are provided for both classroom and individual use.

The Democracy Project

www.pbs.org/democracy

This site offers curriculum resources and student activities related to voting, voting history, and the development of voting rights in the United States. For example, students may participate in a virtual campaign for the presidency through the Build Your Own Campaign activities.

The Federal Judiciary Homepage: News and Information About the Federal Courts: Courts to Classes

www.uscourts.gov/about.html

Provides curricular materials that help students understand the structure and role of federal courts, judicial independence, and other court-related issues.

FedStats: MapStats

www.fedstats.gov/qf

Offers statistical profiles of states, counties, congressional districts, and federal judicial districts.

Images of American Political History

teachpol.tcny.edu/amer_pol_hist/_browse.htm

Includes maps of presidential elections from 1796 to 1968 illustrating the popular and Electoral College votes.

Michelle Parrini and Jennifer Kittlaus are editors and program managers for school programs at the ABA Division for Public Education in Chicago.

**National Archives and Records
Administration Electoral College Home Page**
nara.gov/fedreg/elctcol

Includes information about the 2000 electoral results; results of both popular voting and Electoral College votes from 1789 to 1996; procedural guides; and comparisons of allocation of Electoral College votes based on the 1990 and 2000 Census. Images of a number of original documents may also be found on the National Archives and Records Administration Web site in the Online Exhibit Hall and Online Classroom (www.nara.gov)

**U.S. Federal Election Commission:
About Elections and Voting**
www.fec.gov/elections.html

Provides recent election results, voter registration and turnout statistics, an overview of the Electoral College and U.S. federal election system, and general information about elections and voting procedures.

Related Supreme Court Cases

Shaw v. Reno (509 U.S. 630 [1993]):
laws.findlaw.com/us/509/630.html

Looked at the North Carolina residents' claim that the state created a racially gerrymandered district and questioned whether it raised a valid constitutional issue under the Fourteenth Amendment's equal protection clause.

Miller v. Johnson (515 U.S. 900 [1995]):
laws.findlaw.com/us/000/u10268.html

Addressed whether racial gerrymandering of the congressional redistricting process is a violation of the equal protection clause.

**Shaw v. Hunt (116 S.Ct. 1894 [1996],
No. 94-923):**
laws.findlaw.com/us/000/u20013.html

Explored whether North Carolina's redistricting plan constituted racial gerrymandering in violation of the Fourteenth Amendment's equal protection clause.

Abrams v. Johnson (521 U.S. 74 [1997]):
laws.findlaw.com/us/000/95-1425.html

Examined whether the district court's redistricting plan violated the 1965 Voting Rights Act or Article I of the Constitution, guaranteeing "one person, one vote."

Books

Amy, Douglas J.
***Behind the Ballot Box: A Citizen's Guide to Voting Systems.* Greenwood, 2000.**

This book explains voting systems and voting system reform, covering the range of available voting systems, the way they work, and their political advantages and disadvantages.

Cunningham, Maurice T.
***Whatever the Cost: Race, Redistricting, and the Department of Justice.* Praeger, 2000.**

Examines how the Department of Justice made states maximize minority congressional seats in the 1990s; analyzes the political, legal, and bureaucratic circumstances that evolved into a transformative policy; and suggests how the department should respond to a decade of judicial reversals.

Scher, Richard, Jon L. Mills, and John Hotelling.
***Voting Rights and Democracy: The Law and Politics of Districting.* Nelson-Hall, 1996.**

Discusses the new questions and concerns regarding the law and politics of voting rights and the congressional, state legislative, and local levels.

Tyson, Maurice J., ed.
***Race, Voting, Redistricting and the Constitution.* Garland, 2001.**

The controversies of redistricting have challenged the nation's commitment to anticipatory democracy and its ability to account for its historical record of voting and racial discrimination. This three-volume set brings together all the major legal cases and the most influential articles on the legal and historical arguments concerning this issue.

Online Article

**Cox, Todd A. "Redistricting:
How to Keep It Honest," *National Voter*
(September/October 2001):**
[www.hvv.org/elibrary/nv/2001/
voter_0901_1.html](http://www.hvv.org/elibrary/nv/2001/voter_0901_1.html)

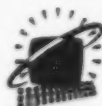
Discusses the politics behind and central issues in redistricting; offers insights on how individuals can get involved in the redistricting process.

Online Lessons

**The New York Times Learning Network
Election 2000 Online Lessons**
[search.nytimes.com/learning/teachers/
lessons/elections.html](http://search.nytimes.com/learning/teachers/lessons/elections.html)

A series of lessons available online that explore the presidential election of 2000. All refer and provide a link to a related, online New York Times article. Lessons include

- A Dark Cloud Over the Sunshine State: Responding to the Voting Mishaps in Florida
- Down for the Count? Exploring the Supreme Court Decision to Halt the Florida Recount
- Hail to the Chief: Exploring Front Page Coverage of Presidential Election Outcomes in the 20th Century
- Rocking the Vote: Exploring Popular and Electoral Votes and Their Influence in Determining the Presidency
- Un-Presidential Election: Assessing the Most Recent Results of and Reactions to the 2000 Presidential Elections
- You've Got My Vote: Comparing Electoral Systems Worldwide in the Wake of Presidential Tie-Up 2000



Come online to link to professional book reviews and excellent online resources for librarians, students, and teachers looking for additional support on the topic of voter representation in the United States.

INSIGHTS

ON LAW & SOCIETY®

A magazine for teachers of civics, government, history & law

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Here's Important News at www.abanet.org/publiced/lawday

Get Your Law Day Planning Guide

Law Day, May 1, is right around the corner. It's already time for your school and community to start planning how to celebrate America's many freedoms on this special day. Let the ABA help make the event the most memorable ever with our many free and low-cost classroom programs, lessons, and supplies. See them all online in our *Law Day Planning Guide* at www.abanet.org/publiced/lawday. If you prefer to order a free printed guide, or if you have some questions, call us at (312) 988-5735, or e-mail abapubed@abanet.org.

... And Invite Students to Enter the Law Day Photo Competition

A Law Day activity your students will love is the Images of Freedom Student Photography Competition. Each year, the ABA invites students ages 12-18 to submit a photo that best captures an aspect of law in their community. First-prize winner receives a \$1,000 U.S. Savings Bond and national coverage, plus a free trip to Washington, D.C., with his or her teacher to receive the award. Visit our Law Day Web site for rules and entry forms.

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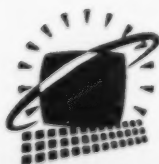
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